

Appeals from a decision of the Oregon State Office, Bureau of Land Management, denying a protest against refund of mining claim maintenance fees. ORMC 19689.

Affirmed.

1. Mining Claims: Generally--Mining Claims: Rental or Claim Maintenance Fees

Payment of maintenance fees will not be accepted for a mining claim following issuance of a decision by the Board of Land Appeals invalidating the claim and while an appeal from that decision is pending before the Federal courts.

APPEARANCES: Roger F. Dierking, Esq., Portland, Oregon, for Appellants; Karen Hawbecker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, DC, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Cameron and Robin Anderson, Gary Hoefler, and Don Wurster have appealed from an October 23, 1997, Decision of the Oregon State Office, Bureau of Land Management (BLM), denying their protest of BLM's decision to refund mining claim maintenance fees paid for the Wilson Placer Mining claim (ORMC 19689), following issuance of Gary Hoefler, 127 IBLA 211 (1993), a case finding the claim was properly declared null and void ab initio. The maintenance fees were paid by Appellants pursuant to provisions of the Omnibus Budget Reconciliation Act of August 10, 1993, 30 U.S.C. §§ 28f through 28k (1994), and implementing regulations at 43 C.F.R. §§ 3833.1-5 through 3833.1-7. The BLM Decision cited Board precedent and found that, consistent with BLM Instruction Memorandum No. (IM) 98-01, dated September 29, 1997, Appellants were not required, while their appeal of this Board's Decision was pending before the Federal courts, to continue to pay claim maintenance fees for the invalid claim.

Appellants argue that this finding is in error, and that provisions of 30 U.S.C. §§ 28f through 28k (1994) require continued payment of maintenance fees for their claim, notwithstanding that the claim was declared invalid by the Department. It is contended that no regulations have been promulgated to provide for the return of maintenance fees in cases such as this, and that IM 98-01 is not such a regulation, not having been published in conformity to the Administrative Procedure Act, 5 U.S.C. § 553(B) (1994). Appellants take the position that return of their fee payments is unauthorized and premature, since the matter remains to be resolved in the Federal courts.

[1] The claim at issue, ORMC 19689, was not subject to the operation of the maintenance fee provision of 30 U.S.C. § 28f(a) (1994), because the 1993 Decision declaring it void was on appeal to the Federal courts, and there has been no showing that the effect of that Decision was ordered to be stayed pending appeal. A mining claimant need not pay maintenance fees for a claim declared void while an appeal is pending, if, after the appeal was taken, the Board or a court does not stay the decision. See Michael E. Haggerty, 142 IBLA 104, 105 (1997); Jerry Grover D/B/A Kingston Trust, 141 IBLA 321, 324 (1997).

The cited cases apply the following instruction appearing in IM 98-01, which, as Appellants argue, has not been promulgated as a regulation: "When a mining claimant seeks judicial review of a final Interior decision in a Federal court, the claimant is under no obligation to maintain the claim. You cannot accept maintenance filings for a claim which the Government denies its existence [sic]." Id. at 3. Notwithstanding that this instruction is not a published rule, it is a practice reasonably premised on a conclusion that, unless a decision declaring a mining claim invalid is stayed, there is nothing upon which to base fee collection, there being no claim in existence upon which the fee depends. Unlike the situation where fees are required to be collected, see, e.g., 43 C.F.R. § 3833.1-5(b) (requiring payment of the maintenance fee), no authority can logically be required to refuse payments not required by the existence of a mining claim.

Appellants have not shown that it was an error for BLM to refuse to accept a maintenance fee payment for a claim following invalidation of that claim on the records of the agency, in the absence of a showing that the effect of the Decision invalidating the claim has been stayed pending appeal. This conclusion finds support in IM 98-01, which states that, should reversal of the agency position concerning claim validity occur, affected claimants shall be given notice that the obligation to make payment of maintenance fees revived when the claim was reinstated. The claimant shall then be allowed to "pay the annual maintenance fee or, if qualified, file a small miner waiver with affidavits of labor for each August 31st deadline which passed during the pendency of the appeal." Id. at 2.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's Decision is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Acting Chief Administrative Judge

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